

<sup>1</sup> As mentioned herein the parties were given an additional period to brief the impact of a recent Supreme Court decision mentioned herein.

### ISSUES

The ALJ found the claimant sustained an accident on January 8, 2003 and as a result, was entitled to 11.86 weeks of temporary total disability, and a 13 percent functional impairment followed by a 52.5 percent permanent partial disability beginning March 24, 2006.<sup>2</sup>

The claimant requests review of the ALJ's Award and suggests the Award was miscalculated based upon the ALJ's factual findings. Succinctly put, claimant maintains the ALJ failed to include the value of the functional impairment in the final award paragraph and as a result, the Award is insufficient. The claimant requests that the Board modify the Award calculation to reflect this computational error.

Respondent asserts a variety of arguments which, not surprisingly, are all designed to deny or minimize claimant's recovery in this matter. First, respondent concedes the ALJ's method of calculating claimant's Award is contrary to established precedent, nonetheless respondent maintains the method appropriately gives respondent credit for the time that it accommodated claimant following his injury.

Independent of this argument, however, respondent stridently argues that claimant failed to establish he sustained any compensable injury.<sup>3</sup> Respondent argues that claimant's current condition is a natural and probable consequence of an earlier workers compensation accident and/or of his own personal condition, rather than as a result of any work-related injury. Accordingly, respondent believes the Award should be modified to deny claimant any recovery whatsoever.

Alternatively, respondent argues claimant's recovery should be limited to a functional impairment, reflecting an aggravation to his right shoulder only, based upon Dr. Fevurly's opinions. Finally, respondent contends that in the event the Board affirm's claimant's entitlement to a work disability, the Board should either affirm the ALJ's methodology in calculating the Award or modify the Award to reflect a 29 - 31.5 percent work disability based upon the opinions of Dr. Morris, Dr. Fevurly and Dan Zumalt, the vocational specialist.

At oral argument, respondent asserted yet another argument based upon the Kansas Supreme Court's recent pronouncement in *Casco*.<sup>4</sup> Respondent contends that *Casco* stands for the proposition that claimant's recovery in this matter is, at best, based

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<sup>2</sup> The 52.5 percent work disability is based upon a 79 percent wage loss and a 26 percent task loss.

<sup>3</sup> This seems a somewhat strange argument given respondent's stipulation that claimant sustained an accidental injury arising out of and in the course of her employment.

<sup>4</sup> *Casco v. Armour Swift-Eckrich*, \_\_\_\_ Kan. \_\_\_\_, 154 P.3d 494, *reh. denied* (May 8, 2007).

upon two separate scheduled injuries, pursuant to K.S.A. 44-510d rather than as a whole body, pursuant to K.S.A. 44-510e(a) provided there is evidence to rebut the presumption that claimant is permanently and totally disabled. Thus, respondent contends claimant is, at most, entitled to a 9 percent functional impairment to his left shoulder, to the extent there is any causally related impairment, and a 0 percent functional impairment to the right shoulder by virtue of a credit for 11 percent preexisting impairment from an earlier injury. Claimant argues that *Casco* cannot be applied retroactively as it's not the law of this case.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Based upon the parties' stipulations, the only issue presented to the ALJ was the nature and extent of claimant's permanent impairment as a result of his January 8, 2003 accident. The ALJ concluded that the claimant returned to work without restrictions following an earlier right shoulder injury. That earlier claim was settled on April 4, 2002 based upon an 11 percent impairment to the shoulder.<sup>5</sup> In addition to the permanency, the settlement provided claimant the right to future medical care.

Claimant returned to his regular job and worked without complaint until January 8, 2003. At that point he returned to Dr. Morris complaining of numbness in his right hand, pain into the neck and all the way into his elbow along with shoulder pain. Following a course of physical therapy, the hand symptoms resolved but the shoulder complaints continued. Following an arthrogram, claimant was diagnosed with another rotator cuff tear in the tendon which was surgically repaired on April 15, 2003. Claimant was eventually released to return to work, but told to avoid lifting over 30 pounds and to keep his work close to his body.

Following this second surgery, claimant was returned to work at an accommodated position. Based upon the record, it appears this accommodation occurred on September 10, 2003. Respondent directed claimant to answer the phone, run the computer, input information and when asked to retrieve parts. A mechanic would retrieve the part with claimant's assistance, but claimant would only be required to carry the requisition order and not the part itself.

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<sup>5</sup> This settlement reflects a negotiated settlement between the parties based upon a 5 percent impairment rating offered by Dr. Morris, the treating physician, and a 17 percent impairment offered by Dr. Murati, claimant's retained expert. These ratings are all to the right upper extremity at the level of the shoulder.

Claimant returned to Dr. Morris on February 9, 2004 complaining of pain in *both* the right and left shoulders. At no time did claimant describe any traumatic event to either shoulder. Rather, claimant explained that his left shoulder began bothering him because he was using it more due to his earlier injury and the subsequent surgery. Dr. Morris' examination was difficult due to claimant's pain. But he recommended physical therapy as well as medications along with another arthrogram. Again, another tear revealed itself and surgery was done on May 18, 2004.

An MRI was done on the left shoulder and while a tear was identified, claimant and Dr. Morris ruled out surgery due to claimant's poor recovery on the right side.

Claimant returned to work following his right shoulder surgery under the original 30 pound restriction and the directive to keep his work close to his body. He worked in this accommodated position until March 24, 2006, when he was the subject of a reduction in the work force. Claimant began actively looking for work beginning March 30, 2006. He obtained employment with Norland Plastics through a temporary placement agency on June 30, 2006, earning \$6.50 per hour. According to claimant, he told the employment agency of his physical limitations and at first the job fell within his restrictions. But as the job requirements increased, he found himself unable to continue so he quit.

Claimant's onsite supervisor, Donald Kuchta, at Norland Plastics testified that claimant did not disclose any restrictions to him. But claimant's restrictions would not have exceeded the job requirements for the job as machine attendant for which claimant was hired. However, he conceded that claimant and other employees are told that they could be assigned elsewhere and that they would need to be prepared to do those jobs if asked. According to Mr. Kuchta, claimant merely stopped showing up to the job site sometime in the second week of September and he has had no further contact with the claimant.

Three physicians have testified with respect to claimant's permanent partial impairment and its connection to his work activities. Dr. Morris, the treating physician who saw claimant both before and after his work-related accident, testified that claimant bears a 15 percent permanent partial impairment to the right shoulder, 5 percent of which was preexisting. He also assigned a 9 percent permanent partial impairment to the left shoulder. Under the appropriate method of converting and combining this ratings, Dr. Morris testified that claimant has an 11 percent whole person impairment attributable to his subsequent injury while in respondent's employ, exclusive of the preexisting 5 percent to the right shoulder. He also recommended claimant not lift over 30 pounds, avoid overhead work and keep all lifting close to his body.

According to Dr. Morris, approximately 10 percent of rotator cuff injuries do not heal. And in this instance, the sheer weight of claimant's right arm made it difficult for claimant's rotator cuff, which included damaged tissue, to stabilize his arm. He further testified that while every day activities could have contributed to his condition, so too could any work activities that required him to lift weights while extending beyond 18 inches from his body.

Finally, Dr. Morris reviewed Dan Zumalt's job task analysis and testified that claimant lost 2 out of the 20 tasks outlined by Mr. Zumalt.

Respondent also sought out the assistance of Dr. Chris Fevurly, a board certified internal medicine physician, to evaluate claimant and assign a permanent partial impairment attributable to the accident at issue. According to Dr. Fevurly, claimant is exaggerating his range of motion complaints and based upon his one-time examination, there is no instability or neurological deficits in either of claimant's upper extremities. Moreover, he testified that the problems in claimant's left shoulder could not be caused by the right as the "science doesn't support that" contention.<sup>6</sup>

Dr. Fevurly opined that claimant had an 11 percent permanent partial impairment to his right upper extremity, but that that impairment preexisted his recent employment efforts and was attributable to his earlier 2001 shoulder injury. And while claimant may have some permanent impairment to his left shoulder, that impairment is not due to his work activities.

After reviewing Dan Zumalt's vocational analysis, Dr. Fevurly testified that claimant had lost the ability to perform 3 out of the 20 tasks, leaving him with a 15 percent task loss.

At his lawyer's request, claimant was also examined and evaluated by Dr. Pedro Murati, a physician who examined claimant in connection with his earlier 2001 claim. Following this second examination, Dr. Murati noted claimant's increased right shoulder complaints along with his neck pain. He diagnosed post right rotator cuff tear with distal clavical incision and subacromial decompression and left rotator cuff tear.

Based solely on the surgeries themselves (excluding claimant's range of motion limitations) Dr. Murati assigned a 15 percent impairment to the right upper extremity, which translates to a 9 percent to the whole body. He also rated the left shoulder at 12 percent, which translates to a 7 percent whole body impairment. When combined, this equates to a 15 percent whole body impairment solely attributable to this injury and not the 2001 injury.

Dr. Murati also testified to a 42 percent task loss, based upon his restrictions on Jerry Hardin's task analysis.

Dan Zumalt testified that the claimant is capable of earning as much as \$14.83 without benefits or overtime while soldering on a production line. Conversely, Jerry Hardin testified that claimant is capable of earning \$320 per week in the open labor market based upon the restrictions imposed by Dr. Murati.

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<sup>6</sup> Fevurly Depo. at 15.

The ALJ concluded that claimant's January 8, 2003 ( the date claimant first sought treatment with Dr. Morris following his return to work at an unaccommodated position) accident caused a bilateral shoulder injury which ultimately led to a permanent partial general body disability, an impairment greater than his functional impairment, as provided for by K.S.A. 44-510e(a). The ALJ gave equal weight to the functional impairment assessments offered by Drs. Morris and Murati and found claimant bore a 13 percent functional impairment. He likewise averaged the task loss opinions offered by both those physicians and found a 26 percent task loss.

The ALJ also imputed a wage to claimant, equivalent to the value of his wages earned at the one job he was able to find after leaving respondent's employ. In doing so, he implicitly concluded claimant failed to make a good faith job search after leaving that job at Norland Plastics. This left claimant with a 79 percent wage loss.

Like the ALJ, the Board has no difficulty concluding that claimant's work activities following his return to work for respondent injured both his right and left shoulders. Indeed, respondent stipulated that claimant sustained an accidental injury arising out of and in the course of his employment, preserving the nature and extent of claimant's impairment as the ultimate issue in this case. Thus, it is difficult to ascertain the factual basis for respondent's contention in this regard. Even so, the evidence clearly establishes that claimant's work activities aggravated his right shoulder which was already compromised as a result of his earlier injury, and injured his left shoulder as well. While Dr. Fevurly doesn't believe that claimant's work activities caused his left shoulder complaints, the Board is more persuaded by the opinions expressed by Drs. Murati and Morris.

The more problematic aspect of this claim stems from the Kansas Supreme Court's recent opinion in *Casco*<sup>7</sup>. Up until publication of *Casco*, and the Court's even more recent decision to deny a rehearing in that case, claimant's bilateral shoulder injuries would have been calculated as a whole body impairment under K.S.A. 44-510e and if claimant had sustained a wage loss in excess of 10 percent, he would have been entitled to a permanent partial general disability, better known as a work disability.

However, *Casco* dramatically changed the workers compensation landscape. With the Court's opinion in *Casco*, over 75 years of precedent was overruled and bilateral injuries such as the one at issue in this case are no longer necessarily considered to be outside the statutory schedule of injuries set forth in K.S.A. 44-510d.<sup>8</sup> Rather, there is a statutory presumption that a combination of injuries, as itemized in K.S.A. 44-510c(a)(2), yields a permanent total status. But when rebutted, then a claimant's recovery is limited

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<sup>7</sup> *Casco* \_\_\_\_ Kan. \_\_\_\_ (2007).

<sup>8</sup> In *Casco*, this issue was never argued to the ALJ or the Board. Rather, this is an issue brought forward by the Supreme Court without the benefit of a full airing by the parties or those who have an interest in this obviously important legal issue.

to a scheduled set of injuries. Thus, respondent maintains claimant is entitled to a permanent partial impairment to his right shoulder and possibly to the left, depending on which physician's testimony is accepted.

After considering the *Casco* opinion, the Board finds that claimant's injuries must be calculated as two separate scheduled injuries. Claimant has worked at least for some period of time since leaving respondent's employ, and nothing suggests claimant is permanently and totally disabled, although when he returned to work, it was for substantially reduced wages. But under the principles expressed in *Casco*, the bilateral nature of claimant's injury and its concomitant effect on his earning power is now irrelevant.

The Board has reviewed the record and finds the testimony and opinion of Dr. Morris, the treating physician, is particularly persuasive. He saw claimant both before and after the injuries at issue and was well informed as to claimant's condition and his treatment. Thus, claimant is found to have sustained a 10 percent permanent partial impairment to the right shoulder<sup>9</sup> and a 9 percent permanent partial impairment to the left shoulder. Based upon *Casco*, his recovery is to be calculated as two separate injuries under K.S.A. 44-510d.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated December 18, 2006, is modified as follows:

### **RIGHT SHOULDER**

The claimant is entitled to 11.86 weeks of temporary total disability compensation at the rate of \$432.00 per week in the amount of \$5,123.52 followed by 21.31 weeks of permanent partial disability compensation, at the rate of \$432.00 per week, in the amount of \$9,205.92 for a 10 percent loss of use of the right shoulder, making a total award of \$14,329.44.

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<sup>9</sup> This 10 percent reflects a 5 percent credit for a preexisting impairment.

**LEFT SHOULDER**

The claimant is entitled to 20.25 weeks of permanent partial disability compensation, at the rate of \$432.00 per week, in the amount of \$8,748.00 for a 9 percent loss of use of the left shoulder.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Phillip R. Fields, Attorney for Claimant  
Vince Burnett, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge